

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

J. C. BERRY,)	
)	
Plaintiff,)	
)	
vs.)	NO. CIV-09-1014-D
)	
)	
STATE OF OKLAHOMA, et al.,)	
)	
Defendants.)	

ORDER

Plaintiff, a state prisoner, brought this *pro se* action pursuant to 42 U. S. C. § 1983, contending that his constitutional rights were violated. In accordance with 28 U.S.C. § 636(b)(1)(B), the matter was referred to Magistrate Judge Bana Roberts for initial proceedings.

As directed by 28 U.S.C. § 1915, the Magistrate Judge reviewed the complaint upon filing. 28 U.S.C. §1915A(a). In an October 8, 2009 Report and Recommendation [Doc. No. 11]¹, the Magistrate Judge recommended that the Complaint be dismissed upon filing for failure to state a claim upon which relief may be granted. 28 U.S.C. §1915A(b)(2). In a separate Report and Recommendation [Doc. No. 8], the Magistrate Judge recommended denial of Plaintiff's request for a Temporary Restraining Order. Plaintiff did not timely object to the Report and Recommendation [Doc. No. 8] addressing his request for a Temporary Restraining Order. Accordingly, he has waived his right to object to the same, and it is adopted.²

¹In a previous Report and Recommendation [Doc. No. 7], the Magistrate Judge had recommended denial of Plaintiff's application to proceed *in forma pauperis*. Plaintiff then paid the full filing fee, thus rendering that recommendation [Doc. No. 7] moot.

²The Magistrate Judge recommended denial of the Temporary Restraining Order because, *inter alia*, Plaintiff failed to comply with the requirements of Fed. R. Civ. P. 65(a).

Because Plaintiff has timely objected to Report and Recommendation [Doc. No. 11] recommending dismissal of the action upon filing, that matter is reviewed *de novo*.

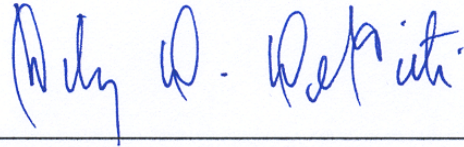
Plaintiff's allegations of Eighth Amendment violations are based on medical treatment he received while confined at Joseph Harp Correctional Center. As the Magistrate Judge explained in detail, Plaintiff complains about medical care related to a sinus condition. Report and Recommendation at pp. 2-3. He complains that he was improperly denied medical care and that the defendants conspired to prevent him from exercising his First and Fourteenth Amendment rights by denying his grievances regarding medical care.

The Magistrate Judge examined the allegations according to the liberal standard of review afforded to *pro se* litigants. *Haines v. Kerner*, 404 U.S. 519 520 (1972). She also analyzed the allegations under the standards of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and concluded that, construing the allegations most liberally in favor of Plaintiff, his Complaint fails to allege sufficient facts to state a claim for relief that is plausible on its face. *Twombly*, 550 U. S. at 570.

The Court has thoroughly reviewed the Complaint and the Report and Recommendation. The Magistrate Judge concluded that Plaintiff's allegations are insufficient to state a claim for relief according to the established standards governing Eighth Amendment claims based on deliberate indifference to medical needs. Report and Recommendation at pp. 5-7. The Court agrees with that analysis, and adopts the same as though fully set forth herein. The Magistrate Judge then analyzed Plaintiff's allegations claiming violations of his First and Fourteenth Amendment rights and concluded that those allegations are insufficient as a matter of law. *Id.* at pp. 7-8. The Court also agrees with that analysis and conclusion and adopts the same as though fully set forth herein.

In his objections to the report and Recommendation, Plaintiff asserts no argument or authority which warrants a rejection of the recommendation that this action be dismissed upon filing. The Report and Recommendation [Doc. No. 11] is ADOPTED. This action is DISMISSED upon filing for failure to state a claim upon which relief may be granted. In accordance with 28 U. S. C. § 1915A(b)(1), the dismissal is without prejudice to the filing of a new action.

IT IS SO ORDERED this 12th day of November, 2009.



TIMOTHY D. DEGIUSTI
UNITED STATES DISTRICT JUDGE

